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ABSTRACT

This manual is intended to aid in the investigation of sexual harassment complaints by providing information specifically addressing special considerations and the analysis of sexual harassment complaints in the employment context. Although primary focus is the investigation and analyses of cases in the State civil service, the principles of investigation and the analyses of cases are applicable to any governmental jurisdiction and to employment in the private sector. Chapter 1 is an introduction. Chapter 2 discusses conducting an investigation. Topics include the investigator's role, a definition of and special considerations regarding sexual harassment, steps in conducting an investigation, determining jurisdiction, organizing the investigative file, limiting the scope of inquiry, conducting a thorough investigation, and writing the report. Chapter 3 concerns the analysis of sexual harassment cases. It defines harassment and provides legal standards for the two basic categories of sexual harassment: work environment and conditional. A case analysis compendium is presented and remedies are listed. Chapter 4 gives a brief overview of major factors to consider in conducting an investigation of sexual harassment allegations. It offers discussions of (1) types, sources, and evaluation of evidence; (2) determining the amount of evidence necessary; and (3) basics of interviewing. Relevant guidelines and codes are appended. (YLB)

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SEXUAL HARASSMENT IN EMPLOYMENT INVESTIGATOR'S GUIDEBOOK

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Foreword

This manual was developed as a joint project of the California State Personnel Board Women's Program and the Sexual Harassment in Employment Project of the California Commission on the Status of Women. Although the primary focus of this manual is on the investigation and resolution of sexual harassment complaints in State civil service, the principles of investigation and the analyses of sexual harassment cases are applicable to any governmental jurisdiction as well as employment in the private sector.

The authors wish to point out that this manual is in no way intended to be a comprehensive or exhaustive discourse on investigative techniques. It is critical that investigators of employment discrimination complaints be thoroughly trained by professionals in the field and that they utilize additional resources. Some of the material presented in this manual has been compiled from a review of various documents which are listed in the bibliography. The remaining information has resulted from the cumulative experiences of the authors in working with complainants, and others involved with the resolution of employment discrimination cases. It is our hope that this manual will assist all parties in reaching a timely and just resolution.

The authors wish to acknowledge the valuable work of Joan Smiles, Ph.D., Technical Services Specialist and Jim Miller, Staff Attorney of the California Department of Fair Employment and Housing (DFEH) in the preparation of the material on the case analysis of sexual harassment complaints. Their material is adapted for use in this guidebook with permission of DFEH.

Finally, our grateful thanks are extended to all of our colleagues who so diligently provided suggestions for improvement of this manual. Special thanks are extended to Laura Santigian-Berger for her invaluable editorial assistance.

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Chapter 1

INTRODUCTION

Sexual harassment in employment is a topic of increasing concern. It is an issue not only affecting the relationship between the sexes in the workplace but also affecting workplace productivity and profits.

Sex roles are rapidly changing as more and more women enter the workplace and demand equal access to all occupations and levels of responsibility. The historical role of women as females in the workplace is being replaced by their role as workers. This rapid change has brought about much confusion in terms of how men and women interact in the workplace. While at one time many viewed the receipt of unwanted sexual attention as merely a part of the job, this view has been replaced by a demand for equal treatment in the workplace which includes freedom from unwanted sexual attention.

The increased sensitivity to sexual harassment has resulted in an increase in the number of complaints and expensive lawsuits filed alleging employment discrimination based on sexual harassment. This type of discrimination is different from others in that, by its very nature, the act itself is defined as discrimination "because of sex". Practically speaking, this means it is not necessary to show an employment consequence because of the refusal of or submission to the sexual advance. The sexual advance in itself is discriminatory. This state of the law is further complicated by the fact that sexual harassment involves volatile issues. One's sex life is generally viewed as a very private matter. Sexual harassment acts and experiences force the disclosure of this usually private behavior making these cases much more difficult than other employment discrimination complaints.

Another complicating factor involves the fact that the judicial interpretation of Federal employment discrimination laws has been liberal with respect to sexual harassment. Strict liability standards have been imposed on employers where supervisors sexually harass employees. The employer may be held liable for large damage awards regardless of whether or not the employer knew of or condoned the act.

Finally, as mentioned earlier, work-environment sexual harassment does not require an actual job consequence. It is sufficient that the harassment created an "intimidating, hostile, or offensive work environment" for a particular complainant. In other words, two parties could view the sexual advances differently and this same conduct would be considered sexual harassment in the case where the advance is unwanted and not the case where the advance was the result of mutual attraction. Note that the conduct must still be "of a sexual nature" but that the creation of an intimidating, hostile or offensive work environment is subject to the complainant's interpretation and not the harasser's intent. This situation makes the investigation of sexual harassment complaints more difficult especially when subtle behaviors are involved or when the investigator views conduct as harmless while the complainant views it as offensive.

All studies completed to date indicate that women are more likely to be victims of sexual harassment than men. Conservative estimates lead us to believe that at least one out of every two women will be harassed at some time during employment. Studies also indicate that about 15% of the male workforce will be harassed and that harassers of men are most often other men. Because women are more often targets of sexual harassment, the examples used in this manual are of harassment of women. However, the principles developed are applicable to any incident of sexual harassment regardless of the sex of the complainant or the perpetrator.

Sexual harassment may also be a very different experience for individuals dependent upon their occupation, economic or social status, race and sexual orientation. The less power and status a person has in an organization, or the more they are perceived as vulnerable, the more likely they are to be harassed. Minority women, lesbians, disabled women and women entering nontraditional jobs may find that sexual harassment also includes race discrimination or other types of discrimination.

Recognizing these difficulties, this manual is intended to aid in the investigation of sexual harassment complaints by providing information specifically addressing special considerations and the analysis of sexual harassment complaints in the employment context. It is imperative that the investigator have a clear and strong sense of his or her role as well as of the investigative process. We have, therefore, included an overview of basic investigation and how an investigation may be conducted. Although the refresher on "Basic Principles of Investigation" is presented as Chapter 4 of this Guidebook, it is important that it be reviewed prior to beginning an investigation.

Finally, we have included a list of some of the many books and articles available in this area including those we have utilized as references in this project.

Chapter 2

CONDUCTING AN INVESTIGATION OF A SEXUAL HARASSMENT COMPLAINT

SECTION A. THE ROLE OF THE INVESTIGATOR

The primary responsibility of the investigator is to obtain all of the information pertinent to the complaint and to reduce this information to a form which will allow a conclusion to be drawn. A successful investigator develops a story. It should include what witnesses saw and heard, as well as other evidence which allows a conclusion to be drawn; in this case, a conclusion regarding whether or not sexual harassment occurred.

It is important that the investigator act as a neutral fact-finder. Personal opinions of the investigator regarding the facts or circumstances of the complaint or the merit of the allegations should not be communicated to anyone during the investigation. The investigator should always be cognizant of confidentiality and other special considerations which are discussed more fully below. The investigator should remain impartial, but not insensitive.

The specific tasks assigned to an investigator may vary from process to process or from employer to employer. The role, however, remains the same: to seek out and evaluate evidence which will allow a determination as to whether or not sexual harassment occurred. The nature and extent of your role must be clear.

Make sure that as the investigator, you are aware of what is expected of you in this process *prior* to initiating the investigation. Clarifying the process and your role will assure that everyone has a clear understanding of that role and will eliminate misunderstandings during the process.

SECTION B. A DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is *unwanted* sexual attention. Such attention is generally directed toward someone who is not in a postition to *freely* refuse the advances, such as an employee dependent upon a supervisor's favorable evaluation for promotion.

Sexual harassment may take many forms including harassment which is verbal ("If you go out with me I'll get you a promotion."), visual (pornographic posters), physical (sexual assault, offensive touching), and gestural (leers and obscence gestures).

Sexual harassment may occur in many contexts (school, street, work). In the work setting, as author Lyn Farley notes in *Sexual Shakedown,* sexual harassment often forces a choice between one's economic livelihood and one's sexual integrity. Such behavior is clearly inappropriate in the work context.

In sorting out whether or not subtle behavior is sexual harassment, it is helpful to consider whether a reasonable person would be embarassed to see his/her behavior described in the newspaper or to his/her family and friends.

(Chapter 3 of this manual presents a more detailed description of sexual harassment as sex discrimination.)

The remainder of Chapter 1 is intended to provide the reader with information of particular importance in the investigation of sexual harassment complaints and to discuss the actual conduct of an investigation from determining jurisdiction to the presentation of investigative findings.

SECTION C. SPECIAL CONSIDERATIONS REGARDING SEXUAL HARASSMENT

There are a number of issues that must be given special considerations by the investigator in a sexual harassment discrimination case. These include:

- Confidentiality.
- The possibility of criminal charges or defamation actions being brought into the process.
- The role of past complaints in investigations of sexual harassment.
- How sexual harassment affects a person.
- Inappropriate focus on harasser's intent.
- The volatile nature of sexual harassment as an issue in the workplace.
- Myths about sexual harassment.
- The reputation of the accused.

Confidentiality

It is essential that the investigator follow prescribed procedures and maintain confidentiality regarding the course and conclusions of any investigation until it is completed. In sexual harassment, the investigator may find that the actual facts of the complaint and the sensitive nature of the specific allegations may require special efforts to maintain confidentiality. For example, an investigator may find that the case includes allegations of explicit sexual activities, sexual assault and other allegations which may be extremely upsetting and embarassing to the complainant and to the alleged harasser should they become generally known. Where an investigator might normally freely share and discuss a case with other investigators or EEO staff, in this instance, the entire investigation should be completed with stricter confidentiality considerations. The investigator should also be aware that because this issue is such a sensitive one and because it is possible that the allegations may not be substantiated, any breach of confidentiality may unnecessarily cause harm to the reputation of the accused harasser. The final report, regardless of the findings, should be kept confidential in secure files with very limited access.

Criminal Charges or Defamation Actions

The investigator should also be aware that charges may be brought in a sexual harassment case which might not

be expected in other types of discrimination complaints. Criminal charges, such as sexual assault, rape, attempted rape, assault and battery, etc., may be filed with local law enforcement agencies. The investigator should be aware of the pending charges, yet proceed with the discrimination complaint investigation. The outcome of the criminal charges is based on a different set of legal standards. The decision in the criminal investigation does not either prove or disprove the presence of discrimination in the workplace.

It is also sometimes the case that the alleged harasser will file a tort action (such as defamation) when he/she hears of the complaint. It is essential that the investigator make note of any such action which may indicate reprisal for filing a complaint. Investigate further to determine if there is reprisal. Strict adherence to confidentiality considerations may avoid complaints of defamation by the alleged harasser.

Role of Past Complaints

It is important to avoid the temptation to review past complaints from the same complainant which do not involve the current incident. For example, an employee may have filed a sexual harassment complaint against a previous employer. This past complaint and its resolution have no bearing whatsoever on the present investigation. Review of these documents only serves to introduce bias into the investigation. For this reason, the investigator should never request, review, or refer to past complaints unless they involve allegations against the same individual(s).

The Effects of Sexual Harassment

Another special consideration in sexual harassment cases is the effect the harassment has on the complainant. In some cases, these effects may prevent the complainant from assisting in the investigation. All discrimination has a negative effect on the individual's work and personal life, but sexual harassment can be particularly devastating because it forces a person to choose between their sexual integrity and their economic livelihood. Further, it requires a discussion of personal sexual issues which has no place in the employment setting. Effects of sexual harassment include: depression, inability to sleep, loss or gain of weight, emotional and pyschological disorders and other physical and mental manifestations. It is not unusual to find emotional effects so severe that the individual is almost incapable of discussing the harassment incident(s).

It is important for the investigator to be aware that the complainant may exhibit any number of stress effects, the consequences of which may lead the investigator to the erroneous conclusion that the individual is failing to cooperate fully in the investigation or that they are not credible.

Inability to fully discuss the incidents, failure to provide documentation in a timely manner and other problems may be only an indication that the complainant is experiencing extreme stress. The investigator should be aware that the individual may be cooperating to the best of her/his ability. A skilled investigator will take this into consideration and not allow the investigation to be biased by the current emotional or psychological state of the complainant.

It is appropriate for the investigator to make the complainant aware of other resources, such as counselors, support groups, workers compensation personnel, physicians, attorneys, or other community specialists available to assist the complainant in making it through this difficult process.

Inappropriate Focus

A common mistake made by investigators is the tendency to analyze the "intentions" of the sexual harasser instead of focusing on the impact of the harasser's action on the complainant. Whether or not harassment occurred depends upon the effect of the acts upon the individual's employment or work-environment and not upon whether or not the acts were intended to cause harm. For example, a work environment which is characterized by sexual teasing, sexual jokes and innuendo may be an offensive and hostile work environment to an individual even though the perpetrators intend such actions to be "good fun". Likewise, a supervisor who seeks dates from subordinates may only intend to be friendly, while the effect is that the subordinates feel, due to the supervisor's position, that dating the supervisor is being made a condition of continued employment.

Sex as a Volatile Workplace Issue

Sexual harassment, by virtue of the fact that it is "of a sexual nature", can be a very volatile issue to investigate. Investigators must anticipate the strong feelings of co-workers and witnesses about sexual harassment as an issue and about the intentions of the individuals involved. There may be a tendency on the part of co-workers to immediately take sides, to express disbelief that it occured and/or to "blame the victim" in much the same way as rape victims are blamed for being raped. The investigator must take into account these reactions when planning and conducting the investigation.

Myths

There are a number of common falsehoods regarding sexual harassment that the investigator should be aware of prior to conducting an investigation. Often an investigator will allow these myths to color the conclusions she/he reaches. Discussed below are the most common of these myths and the correct information.

Myth 1: If a woman was sexually harassed, she must have asked for it, or at least, failed to discourage it.

It is not the responsibility of the employee to stop sexually harassing behavior. If a harasser is in a position of power, the victim may be coerced or feel forced to submit to sexual advances. Even in cases of co-worker

harassment, it may be difficult for an individual to say "no" or it may be that the harasser(s) refused to take "no" for an answer.

Myth 2: People invite sexual harassment by the manner of their dress.

Sexual harassment occurs regardless of the type or style of clothes worn. Further, the investigator should understand that the manner of dress of the complainant is *not* at issue in a sexual harasssment complaint. A perpetrator of sexual harassment may not use the complainant's manner of dress as a defense or excuse for sexually harassing behavior. In addition, an employer may be held liable for sexual harassment charges if he/she required the wearing of clothes that resulted in sexual harassment by a third party.

Myth 3: Most charges of sexual harassment are false and are used as a way to get back at supervisors or co-workers.

It is difficult to complain about sexual harassment because very often the complainant is not believed, and may suffer embarrassment and retaliation for filing a charge. Complainants have much to lose and little to gain by filing false charges considering the difficulty of pursuing a complaint.

Myth 4: People invite sexual harassment by their "lifestyles".

Regardless of the lifestyle (such as single, divorced, gay or lesbian, feminist) of an individual, it is not an excuse or justification for subjecting him/her to unwanted sexual attention. People should not be treated as a sexual conquest or challenge. Further, if the investigator discovers during the course of the investigation, personal information (e.g., sexual orientation) about the complainant, the investigator must make sure that this information does not bias her/his findings.

The Accused's Reputation

Another pitfall for the investigator is the tendency to disbelieve the complainant because there were no witnesses and because the accused harasser has never harassed anyone else or because he/she has a good reputation. Although evidence of past harassment of others by the accused may help corroborate the complainant's allegations, the opposite does not hold true. The lack of evidence that an individual has harassed others does *not* constitute evidence that *no* harassment occurred. Sexual harassment, especially sexual assault, attempted rape and other serious offenses most often occurs in private, with no witnesses present, and may be perpetrated by an individual who is otherwise known to be a "model" employee. The investigator must carefully evaluate the testimony of the complainant and the alleged harasser, as well as any other relevant evidence, before reaching a conclusion.

All of these special considerations combine to make the sexual harassment complaint perhaps the most difficult of discrimination complaints to investigate. Because these cases are so difficult, it is essential that the investigator be trained in investigation and discrimination issues. It is also recommended that the investigator have experience with other types of discrimination investigations before beginning a sexual harassment discrimination investigation.

SECTION D. STEPS IN CONDUCTING AN INVESTIGATION

The following is a list of steps which must be completed in the conduct of any investigation of a sexual harassment complaint. In the remainder of the chapter, five major areas in this process are discussed in more detail.

1. Review the complainant's statement of discrimination to determine the basis(es) for the complaint and to gain an understanding of the issues presented.
2. Determine jurisdiction.
3. Open and organize an investigative file.
4. Thoroughly review all statements, evidence and documents currently contained in the file in order to become well acquainted with the facts of the case and to assist in planning the investigation.
5. Limit the scope of inquiry.
6. Plan the investigation by making lists of witnesses to interview and evidence to gather.
7. Determine additional or clarifying information needed from the complainant, alleged harasser, employer, and witnesses.
8. Plan the interviews carefully. Prepare a list of questions to ask.
9. Conduct interviews.
10. Gather supporting documentation and evidence.
11. Visit the worksite, if necessary.
12. Analyze the information.
13. Make a determination of findings.
14. If sexual harassment is found, determine/recommend appropriate remedy.
15. Write and present the investigator's report of findings.

SECTION E.
DETERMINING JURISDICTION

The first issue in the conduct of the investigation is verification that jurisdiction for the investigation of the sexual harassment complaint exists. Although in most cases this will be pre-determined prior to assignment of the case, there have been many instances where jurisdictional issues are not resolved prior to the investigation. This results in an investigation being completed with no ability to offer remedy or provide resolution. Listed below are four examples of jurisdictional issues within State civil service. They may also be applied to situations in private or other public employment.

Example One:

A complaint of sexual harassment is filed by a full-time State civil service employee. In the complaint, he charges that the departmental Deputy Director, an exempt employee (non-civil service), made sexual advances. As the departmental EEO investigator, you are assigned to investigate. Do you have jurisdiction since a noncivil service employee is charged?

Quite clearly, yes. A discrimination complaint is a charge by an individual against the employer. As a representative of the employer, you are assigned to investigate any and all charges made by employees of the department. It is true, in this case, that because the individual charged is "exempt" from civil service, there may be no jurisdiction to take adverse action against the exempt employee under the usual civil service rules for adverse actions. However, this would only be a consideration in the investigator's recommendation of remedy, should a finding of sexual harassment be made. It has no bearing on your jurisdiction over harassment against the complaining party.

Example Two:

A number of employees of a State department report that a client who visits their office subjects them to verbal sexual comments on a regular basis. They file a complaint and request an investigation. As the departmental EEO investigator, do you have jurisdiction?

Again, yes. Remember that the employer is responsible for preventing discrimination and harassment of all departmental employees regardless of the source of the harassment or discrimination.

Example Three:

A State employee in your department is charged with harassment of a welfare recipient. Do you have jurisdiction?

Yes. The case would most likely proceed on the basis of inappropriate conduct proscribed, for example, by California Government Code Section 19572(m, q, w or x) which authorizes adverse action for discourteous treatment of the public or other employees, violation of board rule, unlawful discrimination, including harassment, and unlawful retaliation, respectively. Further, other department policy or code relating to the delivery of services may proscribe discriminatory acts against the public.

Example Four:

You are asked to investigate a complaint of sexual harassment of an employee in *another* department charging one of your departmental employees. Do you have jurisdiction?

The other department is responsible for the investigation of the discrimination complaint filed by their employee. However, your department may conduct an investigation to determine whether or not punitive or adverse action should be taken against your employee. In most instances, this investigation would be made by those responsible for determining adverse action for improper behavior, not by the EEO investigator.

Employers may also be subject to the regulations of the Federal Equal Employment Opportunity Commission (EEOC), the State Department of Fair Employment and Housing (DFEH), State and Federal Title IX and any other local ordinances or regulations relating to contracts that may be applicable. For instance, EEOC has jurisdiction over those employees who work for an employer having 15 or more employees and effective January, 1985 DFEH has jurisdiction for harassment complaints only over any employer. Local regulations vary. Employers using governmental monies or having governmental contracts may also be subject to regulations which prohibit discrimination in the delivery of services and/or in employment.

It is essential that the investigator know her/his jurisdictional boundaries and satisfy those limitations prior to beginning the investigation.

SECTION F.
ORGANIZING THE INVESTIGATIVE FILE

The accuracy of the determination and the effectiveness of the investigator in providing a satisfactory resolution will depend to a great degree on the organization and quality of the investigator's file and report. It is essential that the investigative file be maintained in an organized manner. This will facilitate the completion of the investigation should the assigned investigator be unable to complete it. It will also assure that the investigator completes all necessary steps.

A suggested method of organization is found on the following page. However, regardless of the method used, it is critical that it be documented in the report and that all essential items be included. This method follows closely the method used by the EEOC.

Organizing the file in this manner will assure that no essential elements of the investigation have been forgotten. Good organization will enable anyone reviewing the file to understand the issues and how the determination was made.

SAMPLE FILE FORMAT

Case identification name/number
Table of Contents
Statement of Complaint/Charge
Timeframes/Deadlines for Completion of Case
Jurisdictional Items
Complainant's Statement
Statements of Complainant's Witnesses
Statements of Employer(s) and Employer's Witnesses
Employer's Records and Documents
Statements of Other Witnesses
Tour of Worksite
Investigator's Analysis
Investigator's Notes.
List of Witnesses/Persons Contacted
Other Relevant Information
Irrelevant Information

SECTION G. LIMITING THE SCOPE OF INQUIRY

One objective of the investigator is to limit the scope of inquiry by restricting the investigation to the specific allegations of sexual harassment at issue.

The scope of inquiry is limited to the relevant immediate environment in which the complainant experienced discrimination or "harm". The investigation will be limited to the gathering of information within the organizational structure where the complainant suffered harm. Limiting the scope of inquiry to only the relevant, disputed issues will create the basis for a clear and concise investigation.

This is accomplished by completing a series of steps which address the issues of the case.

1. Examine the charge or statement of discrimination. Determine and clarify the specific allegations by reviewing the statement of the complainant and any supporting evidence, witness statements or affidavits submitted by the complainant.
2. Contact the complainant to verify that all allegations are included and to request additional information if the original statement fails to identify specific areas of individual harm or if clarification is needed.
3. Identify issues which are not disputed.
4. Identify issues which have already been investigated.
5. Identify charges which are not relevant to employment discrimination or are not material to this investigation.
6. Isolate remaining issues which will be the subject of the investigation.

Failure to limit the scope of inquiry is a common mistake of investigators. It results in a long, unclear process which makes it difficult to reach a well-reasoned conclusion.

SECTION H. CONDUCTING A THOROUGH INVESTIGATION

Although the role of the investigator may vary somewhat from one organization to another, the essential duty of all investigators is to assure that a complete and thorough investigation is conducted. The task of determining when it is complete is often difficult for the inexperienced investigator.

An investigation can only be considered complete when there are no further worthwhile avenues of inquiry. The investigator must make a judgment as to whether or not to continue based on the following indicators:

- The nature of the case. This is based on: (1) the nature of sexual harassment charges; (2) the possible extent of the harassment and the number of individuals involved; (3) whether or not there is an indication of continued harassment; and (4) whether retaliation is occurring or has occurred.
- If additional evidence seems warranted, will the particular evidence affect a determination of the outcome? Does the lack of evidence relate to the charge as a whole or to a specific allegation which is not essential to the determination?
- Will further investigation facilitate reaching a resolution to the complaint?
- How much investigative time is necessary to obtain additional evidence? The investigator must weigh the importance, relevance, and need for the additional evidence sought against the amount of time necessary to obtain it in order to determine whether or not to continue.

For example, investigators often fail to interview the alleged harasser because statements from several witnesses "clearly" substantiate the allegations. While such an investigation may be sufficient to determine that harassment occurred, the investigator has failed to consider an essential source of evidence which may reveal further information.

No investigation should be considered complete merely because there appears to be enough evidence available to support a conclusion one way or the other. Thoroughness and a serious effort to fully investigate all sources of evidence are the only proper tests establishing the time to terminate an inquiry.

SECTION I.
WRITING THE INVESTIGATIVE REPORT

A discrimination complaint investigative report includes a cover memorandum of investigator's fidings and the information contained in the case file as indicated in Section F, above. It must be clear, concise, accurate and complete. The report serves as a written record of the facts of the complaint and is used to make a determination.

The report should be written to include all necessary details. Partial information or evidence may lead to an incorrect conclusion. Include all relevant information, but leave out anything irrelevant. Be as brief as possible.

The reader should be able to understand the report and conclusions without having to ask additional questions of the investigator.

The reader must be able to rely on the information found in the report. Accuracy is an absolute must. Inaccurate information in any part of the report will cause the reader to question the reliability of the entire report as well as the conclusion of the investigator.

It is the investigator's responsibility to present clear findings as to whether or not discrimination occurred. It is essential that the investigator reach and state specific conclusions on each allegation based upon the evidence gathered during the investigation. The investigator's skill at presenting the facts and conclusions will ultimately determine whether or not the complaint is satisfactorily resolved.

The investigator's findings must at least include the following:

1. A finding and conclusion for each allegation. (A finding of merit or no merit to the allegation(s) of discrimination.)
2. Appropriate jurisdictional information.
3. Evidence and rationale for each conclusion.
4. Findings regarding other violations or inappropriate actions which were not discrimination-based, such as improper personnel transactions, violations of the Information Practices Act, or generally poor management practices.
5. Proposed remedy(ies), if discrimination has been found.

Normally, the memorandum of investigator's findings serves as a summary of the report and is written as a cover memorandum to the final draft of the investigator's report. It is a summary which includes the who, what, why, when, where and how of the complaint in a clear and concise manner. The evidence supporting the findings should be referenced and the conclusions and recommendations clearly stated. The remainder of the report is merely an organized compilation of the various evidence gathered during the conduct of the investigation.

The following page presents a sample format for a memorandum of investigator's findings. Although the format may vary, the investigator's findings should include all essential elements.

SAMPLE FORMAT FOR MEMORANDUM OF INVESTIGATOR'S FINDINGS

Date: June 13, 1984

To: Manager/Employer
From: Investigator
Re: Case Name/Number

I. *Allegation* — *Recommendations*

1. Sexual Harassment	Merit
2. Sexual Harassment (Refusal to Hire)	No Merit
3. Retaliation	Merit

II. *Jurisdiction*

The complainant is employed by the Department of Public Works as a full-time civil service employee. The complainant met all requirements for timely filing of the complaint.

Alleged violations:	Oct. 12 and 26, 1983	Departmental decision:	Apr. 10, 1984
Complaint filed:	Nov. 19, 1983	Appeal filed:	May 6, 1984

III. *Evidence/Rationale for Recommendations*

On October 12, 1983, the supervisor of Section IV approached the complainant and requested that she spend the evening with him to discuss her upcoming work performance evaluation. She refused the supervisor. She felt that she was being asked to comply with sexual favors in return for a good rating. The complainant subsequently received a poor performance report.

The supervisor admits asking the complainant out, but denies that her refusal to go out with him was a factor in her poor performance report. The draft copy of the performance report, given to the complainant prior to the alleged harassment of October 12, 1983, indicates that the supervisor rated her superior on two factors and above average on four factors. However, the supervisor's ratings on the final report dated October 26, 1983 completed after the harassment of October 12, 1983 were much lower. The supervisor is unable to explain why he changed the report. Therefore, there is evidence that the lowered performance report ratings were a result of her refusal to comply with the sexually harassing advances.

The complainant further alleged that she was denied a job in another unit based on the poor performance report. However, the supervisor of that unit has no awareness of the sexual harassment complaint and has no affiliation or association with the supervisor of Section IV. There is no evidence that this supervisor had any knowledge of either the refusal of the complainant to date the supervisor of Section IV or the fact that she had filed a formal complaint.

Further he was able to provide a copy of the rating sheets of all competitors which indicated that the ratings of the complainant were consistent with reports previous to October 12, 1983, and appeared to represent a fair estimate of complainant's ability to perform the job. The rating sheets also indicated that the performance reports were not seen by the raters and had no bearing on the decision not to hire the complainant. Therefore, it does not appear that sexual harassment was a factor in the decision not to hire the complainant.

Finally the complainant alleged that she was subjected to verbal abuse, loss of overtime and was given unequal work assignments as reprisal for filing the discrimination complaint. Co-workers, records of work assignments and overtime payroll records all verify that after filing the complaint on November 19, 1983, the complainant recieved different types of work assignments than she had been receiving prior to that date. She was also verbally harassed by the supervisor and was refused requested overtime work which prior to the complaint she had routinely been given. Therefore, the evidence supports the claim of retaliation for filing a discrimination complaint.

IV. *Other Violations*

There were no other violations or incidents of discrimination found.

V. *Proposed Remedies*

The complainant has requested to be moved to another unit within the department, to have her personnel file purged of all references to poor performance related to this incident and to have the supervisor formally reprimanded. Management states that it would be a hardship to move her to another unit, but that they agree to provide the other remedies.

I recommend that the complainant's request for remedy be granted in full. The evidence regarding the retaliation indicates that the complainant should be allowed to move to another unit regardless of the "hardship" involved for management.

VI. *Appendices*

A. Complainant's and Respondent's statements
B. Witnesses statements
C. Pertinent documents

Chapter 3

THE ANALYSIS OF SEXUAL HARASSMENT CASES

SECTION A. WHAT IS HARASSMENT?

In general, harassment is offensive conduct that occurs within the scope of employment and on the basis of a protected classification, such as race, sex, disability, medical condition, etc. In some harassment cases it is necessary to prove the causal connection between the adverse action of harassment and the basis for the harassment, just as would be done in a "standard" termination or selection case.

Example 1:

A Black complainant was physically harassed by his co-workers. He believes this occurred because of his race, but there is nothing in the nature of the harassment itself to suggest that it was "because of race". If the causal connection can be proven, then race harassment exists.

Example 2:

A female assembly worker is yelled at and criticized daily by her supervisor. She believes that this is occurring because she is a female. There is nothing in the content of the supervisor's remarks, however, to suggest that he was doing this "because of sex". If the causal connection can be proven, then sex harassment exists.

In some harassment cases, however, the nature of the harassment itself makes it clear that the harassment is being done because of the complainant's protected status. The complainant's protected status is the focus of the harassing actions; thus, there is no dispute that the causal connection exists.

Example 3:

A Black complainant was called racially derogatory names by a supervisor. The racially derogatory content of these remarks tells us that the supervisor harassed the complainant "because of" the complainant's race. Since the causal connection is clear, the real dispute in this case will be only whether the harassment actually occurred.

Example 4:

A female construction worker was told by her co-workers on a daily basis to go back to the kitchen, that women were too weak to do construction work, and that her presence made the worksite dangerous for men. The sexist content of this verbal harassment makes it clear that it is being done "because of" the complainant's sex. Since the causal link is clear, the real dispute in this type of case will be only whether the harassment actually occurred.

Sexual harassment is a form of the latter type of harassment in which the causal link is clear. But unlike "*sex* harassment", where the complainant's status as a woman is the focus of the harassment, "*sexual* harassment" focuses on the woman's sexual status. In these sex and sexual harassment cases, however, the nature of the harassing act itself makes it clear that the harassment was done "because of sex".

Sexual harassment is a form of discrimination based on sex. The Federal Equal Employment Opportunity Commission (EEOC) Guidelines, the California Fair Employment and Housing Commission (FEHC) Regulations, State and Federal Title IX and the California State Personnel Board (SPB) all define sexual harassment as *unwanted sexual advances* and *other visual, verbal* and *physical conduct* of a *sexual nature.* (See Appendices)

A wide variety of conduct may be considered sexual harassment. For example:

- Sexual advances which are unwanted (may include situations which began as reciprocal attractions, but later ceased to be reciprocal).
- Reprisals or threats after a negative response to sexual advances.
- Employment benefits offered in exchange for sexual favors (may include situations where a third party is treated less favorably because others have acquiesced to sexual advances).
- Visual conduct such as displaying sexually suggestive objects or pictures, cartoons or posters.
- Leering or sexual gestures.
- Verbal abuse of a sexual nature, sexually explicit jokes and comments. Sexually suggestive letters, notes or invitations.
- Physical conduct such as assault, attempted rape or rape, impeding or blocking movement and touching.

Generally, sexual harassment is considered unlawful where an individual suffers the loss of an employment benefit because of the harassment. However, it is not necessary to show a loss of tangible job benefits, such as a job or promotion, in order to establish harassment. The definition of the term "employment benefit" is very broad and includes the intangible benefit of "the provision of a discrimination-free workplace"; that is , a workplace free of harassment. Since sexual harassment always denies this particular type of employment benefit, such harassment is itself prohibited, even if the complainant does not lose a job or promotion. Of course, much sexual harassment is also linked in various ways to these other, more tangible losses: pay, choice assignments, promotions and even employment itself. Thus in analyzing any sexual harassment case, it is essential to distinguish two basic categories of sexual harassment:

Work-environment Sexual Harassment refers to situations in which the acts of sexual harassment create a hostile, intimidating, or offensive working environment. The term applies to the act(s) of harassment themselves. A non-discriminatory work envir-

onment is denied by the acts of sexual harassment. The harassment has the effect of interfering with the complainant's work performance or creates an intimidating, hostile, or offensive working environment. There need be no other loss of employment benefit(s) resulting from the sexual advances or other acts of sexual harassment.

Conditional Sexual Harassment refers to situations in which the sexual harassment results in termination, failure to hire, or the loss of some other tangible job benefit. The term applies when there is the loss or threatened loss of a tangible employment benefit (such as refusal to hire or promote, discharge, constructive discharge, denial of pay) linked to the harassment. The submission to such harassment is made a condition of retaining the employment benefit and rejection of sexual harassment is used as a basis for denying the employment benefit.

There are four common types of "conditional" sexual harassment:

a. *Sexual Harassment and Termination (or any adverse act).* In many cases, the harasser will make clear to the complainant that he/she must respond to his/her advances or be terminated, or lose some other valuable employment benefit. When he/she refuses, she/he is terminated or loses the other benefit (a promotion, pay increase, etc.). She/he has then suffered both the harassment itself and the loss of the more tangible employment benefit.

b. *Sexual Harassment and Constructive Discharge.* In other cases, the harasser does not condition some tangible job benefit on the complainant's compliance with sexual advances, but there is nevertheless an additional harm done to the complainant beyond the harassment itself. In these cases, the harassment makes life so intolerable for the complainant that he or she resigns and thus suffers the additional harm of losing her/his employment. This is known as constructive discharge, because the sexual harassment motivated the employee to quit her/his job.

c. *Sexual Harassment and Adverse Act and Constructive Discharge.* In still other cases, elements of the two situations above are combined. The harasser makes sexual advances and conditions tangible employment benefits (e.g., a pay raise the complainant already deserves) on the complainant's compliance. The complainant refuses and loses the benefit. This loss of benefit makes the complainant's work situation sufficiently intolerable so that she/he quits and thus suffers a constructive discharge. Here the complainant has incurred two distinct losses, pay and termination of employment, in addition to the harm of the harassment itself.

d. *Sexual Harassment and Refusal to Select.* In some cases, the tangible employment benefit that the harasser conditions on the complainant's response to his advances is a job or job assignment that the victim does not yet have and wants to be selected for. When he/she refuses the advances, the harasser refuses to select her/him, and he/she suffers both the harassment itself and the denial of selection.

Further, the investigator should be aware that the Federal EEOC Guidelines [§1604.11 (g)] state that an employer may be held liable for unlawful sex discrimination against individuals who were *qualified for* but *denied* employment opportunity or benefit because another received the benefit due to submission to sexual advances. (See Appendix A.)

SECTION B. WORK-ENVIRONMENT SEXUAL HARASSMENT

There are multi-part legal standards for both work-environment and conditional sexual harassment. The legal standards for "work-environment" sexual harassment are different from those for most other cases. Usually discrimination is defined as those situations in which an employer takes an adverse action "because of" the protected basis. Generally, the focus of a sex discrimination complaint is on the question of whether or not the discrimination was "because of the employee's sex". However, sexual harassment is defined to be a form of sex discrimination and there is no question of whether the action was motivated by the sex of the complainant as there is in other types of discrimination cases. If the harassment occurred, it automatically is "discrimination because of sex". Thus, the disputed aspects of a harassment case may be somewhat different from those in a standard termination or selection discrimination case. The dispute will most likely revolve around whether or not the harassment occurred rather than on the motivation for such actions.

The legal standards for "work-environment" sexual harassment follow.

Work-environment sexual harassment is shown if:

1. Acts of sexual harassment occurred; *and*
2. These acts created an intimidating, hostile, or offensive working environment *or* otherwise interfered with the complainant's work performance; *and*
3. The employer is liable for the acts of sexual harassment that occurred. Liability is shown if:
   a. A supervisor was the harasser, *or*
   b. A non-supervisory employee was the harasser, and the employer had actual or constructive knowledge of the harassment. Constructive knowledge exists if the employer *should have*

known of the harassment. Constructive knowledge will be imputed to the employer if, among other things, the employer *did not take preventive measures* to keep the harassment from occuring.

It is not always clear what consititutes an "intimidating, hostile, or offensive working environment" or what constitutes "interference with the complainant's work performance". However, there are some general guidelines. The harassing acts must taint the work atmosphere or environment enough to bring discomfort to the complainant. To determime this, consider the following:

Nature of the Incidents

Where did the sexually harassing acts take place? Did they occur at the complainant's place of employment? If not, were they somehow brought into the employment atmosphere? For example, if the supervisor was the harasser, the very nature of the supervisor's position of authority may automatically bring the incident into the employment atmosphere, even if the incidents occurred away from the worksite.

How offensive, or how intimidating were the sexually harassing acts? Action and behavior that women consider sexually offensive are often not viewed the same way by men. It is important to be sensitive to the complainant's perception of these situations. The legal standard asks whether *she/he* (the complainant) is intimidated or offended, not whether somebody else would have been. *Remember that the complainant has a right to a non-discriminatory work environment.*

Extent of the Incidents

Were the sexually harassing acts isolated ones or continuous? One incident may not be enough but it may still qualify if it is sufficiently offensive. On the other hand, a series of two or more "not-so-offensive" incidents taken together will be sufficient.

Employer liability depends on whether the harasser was an agent or supervisor or a non-supervisory employee. The employer is automatically liable for the acts of sexual harassment committed by agents or supervisors. When the harasser is a non-supervisory employee, the employer will be liable if the employer had actual or constructive knowledge ("should have known") that the harassment occurred. Employers must take all reasonable steps to prevent harassment from occurring. Constructive knowledge will be imputed automatically to the employer unless it can be established that reasonable steps to prevent harassment were taken. If the employer failed to take sufficient preventive measures, then it will be held to have constructive knowledge. But even if the employer can show that preventive measures were taken, it may still be possible to demonstrate constructive knowledge. Other circumstances might demonstrate that the employer should have known despite the preventive measures.

Failure to notify an employer of sexual harassment committed by a non-supervisory employee does not constitute an affirmative defense according to the FEHA. While notification establishes actual knowledge, the employer cannot escape liability for the harassing acts of a non-supervisory employee even where the complainant has not informed the employer of such harassment if the employer knew or should have known through other sources.

Note well that standards for employer liability may differ under interpretations of State Civil Service Statutes or other interpretations under the EEOC Guidelines.

SECTION C. CONDITIONAL SEXUAL HARASSMENT

As indicated above, "conditional" sexual harassment is unlawful where an individual loses or is threatened with the loss of a tangible job benefit. Each denial of a tangible job benefit resulting from sexual harassment is a distinct adverse act in addition to the sexual harassment itself. These distinct acts of harm should be analyzed separately applying the "work-environment" standards as discussed above to the sexual harassment itself and the multi-part legal standards discussed below to the "additional" act(s) of harm resulting from the sexual harassment.

The legal standards for "conditional" sexual harasment differ depending on the nature of the "additional" act of harm that results from the sexual harassment. The following are the legal standards for the most common types of "conditional" sexual harassment cases:

1. *Sexual Harassment Resulting in Termination (Any Adverse Act)*

   Discrimination is shown if:

   a. The complainant was sexually harassed and the respondent took additional adverse action against the complainant (e.g., termination); *and*

   b. A causal connection exists between the adverse action (termination) and the complainant's response to the sexual harassment.

   Unlike "work-environment" sexual harassment, the legal standard for this type of "conditional" sexual harassment is similar to that used in most discrimination cases. The major question is whether a causal connection exists between the protected basis and the adverse act. In this type of "conditional" sexual harassment case, the legal standard simply substitutes sexual harassment for the protected basis and asks whether a causal link exists between the adverse action (in this case, termination) and the complainant's response to the sexual harassment. A single incident of sexual harassment will be sufficient. The

harassment does *not* have to meet the standards for "work-environment" sexual harassment.

The sexual harassment need not be the sole reason for the adverse action. Even if other non-discriminatory factors entered into the employer's decision, the standard is still met as long as the sexual harassment was at least one of the factors influencing the decision. Also, like "work-environment" sexual harassment above, there is no need to show that the harassment occurred "because of sex" since sexual harassment is by definition "because of sex".

2. *Sexual Harassment Resulting in Constructive Discharge*

Discrimination is shown if:

a. Unlawful sexual harassment occurred (the standards for "work-environment" sexual harassment above); *and*

b. The unlawful sexual harassment made working conditions so intolerable that the complainant was forced to resign; *and*

c. The employer either intended to cause the resignation or had actual or constructive knowledge that resignation was likely to result. Constructive knowledge exists if the employer should have known that resignation was likely to result. Constructive knowledge is shown if, among other things, the working conditions were sufficently intolerable.

Constructive discharge cases involve those situations in which the complainant voluntarily resigns because some discriminatory act made her/his working conditions intolerable. In this case, it is the acts of sexual harassment themselves that make working conditions intolerable.

In order for the complainant's voluntary resignation to qualify as a "discriminatory" constructive discharge, the situation must meet a three-part legal standard.

The first element of this standard asks whether unlawful sexual harassment occurred as is shown if the harassment meets the standards for "work-environment" sexual harassment as discussed above. If the harassment is unlawful (done "because of sex") then the constructive discharge, which occurred because the harassing acts created intolerable working conditions, will also be unlawful ("because of sex"). On the other hand, if the sexual harassment was not unlawful then the constructive discharge will not be discriminatory.

The State Fair Employment and Housing Commission has defined constructive discharge as follows:

> An employee is constructively discharged when the employer, with the intent to cause the employee to resign, makes the working conditions so intolerable that the employee is forced to resign.

Based on this definition, the second element of the legal standard asks whether the unlawful sexual harassment created working conditions so intolerable that the complainant was forced to resign. "Intolerable" is looked at much the same way as "intimidating, hostile, offensive work-environment" discussed above and depends in a similar way on the nature and extent of the sexual harassment. However, another factor affecting "intolerable working conditions" is any corrective action that may have been taken by the employer.

The whole of the circumstances must be assessed in order to decide whether the situation was intolerable enough to stimulate resignation. A single isolated incident will usually not be considered enough, unless it is particularly serious. On the other hand, a series of less serious incidents together may suffice.

As noted in the definition of constructive discharge, an intent requirement is also present and is satisfied if the employer knows or should know that resignation is likely to result. Therefore, the third element to the legal standard asks whether the employer intended to cause the resignation or whether the employer had actual or constructive knowledge that resignation was likely to result. It is sufficient, but not necessary, to show that the conscious motivation of the employer in causing or permitting the harassment was to force the complainant to resign. Instead, one can show that the employer had actual knowledge or should have known that resignation was likely to result.

With regard to constructive knowledge, the employer is expected to have known that the complainant would feel compelled to resign if the conditions under which she worked were sufficiently bad. Employers are expected to have a relatively high degree of sensitivity. If, for example, the male managers of the employer insist that *they* would not have resigned under such circumstances, or that they had no idea a female employee would feel so oppressed by such conditions, that *does not* relieve the employer of its duty to "know" that resignation would result. The employer will be expected to be aware of how a reasonable woman would feel under such circumstances.

3. *Sexual Harassment Resulting in Any Adverse Act Resulting in Constructive Discharge*

Discrimination is shown if:

a. The complainant was sexually harassed and the employer took an additional adverse act against the complainant (e.g., reduction in overtime work); *and*

b. A causal connection exists between the adverse act (reduction in overtime work) and the complainant's response to the sexual harassment; *and*

c. The unlawful adverse act (reduction in overtime work) as shown in a. and b. above made working

conditions so intolerable that the complainant was forced to resign; *and*

d. The employer either intended to cause the resignation or had actual or constructive knowledge that resignation was likely to result. Constructive knowledge is shown if, among other things, the working conditions were sufficiently intolerable.

In this type of case, the complainant is sexually harassed and two other acts of harm occur that are linked to the harassment. The first "additional" act of harm (e.g., reduction of overtime work) is caused by the sexual harassment itself. This act of harm, in turn, causes the constructive discharge by creating working conditions so intolerable that the complainant is forced to resign.

The legal standards for this category of case combine aspects of the two types of conditional sexual harassment discussed above (sexual harassment resulting in termination and sexual harassment resulting in constructive discharge). The multi-part legal standard first asks whether the complainant was sexually harassed and whether a causal connection exists between the adverse act and the complainant's response to the sexual harassment. If this causal link is shown, then the adverse act is unlawful (and therefore "because of sex").

The legal standard then asks whether the unlawful adverse action caused the constructive discharge by creating working conditions so intolerable that the complainant was forced to resign. As in sexual harassment constructive discharge cases above, the standard continues to ask whether the employer had actual or constructive knowledge that resignation was likely to result. Constructive knowledge is shown if the working conditions were sufficiently intolerable.

4. *Sexual Harassment Resulting in Refusal to Select*

Discrimination is shown if:

a. The complainant was sexually harassed and the employer took an additional adverse act against the complainant (e.g., failure to hire); *and*

b. A causal connection exists between the adverse act (failure to hire) and the complainant's response to the sexual harassment.

This type of case uses the same legal standard as "sexual harassment resulting in termination" cases above. That is, discrimination is shown if the complainant was sexually harassed (a single incident is sufficient) and a causal link exists between the adverse action (e.g., failure to select) and the complainant's response to the sexual harassment.

SECTION D.

CASE ANALYSIS COMPENDIUM

CONDITIONAL SEXUAL HARASSMENT: Sexual harassment in termination (or any adverse act), selection, and/or constructive discharge cases.

RELEVANT GENERAL QUESTIONS:

DID HARASSMENT OF A SEXUAL NATURE OCCUR?

- Was the harassment (alleged incident(s)) of a sexual nature?
- Does the evidence indicate that the alleged incident(s) occurred? Look for anecdotal or documentary evidence such as a diary or letter to employer or statement from the complainant, witnesses or employer.
- Is there evidence of a pattern of similar incidences which indicate that the alleged incident(s) occurred? Has the charged individual harassed others? Interview others who may have knowledge of past harassment.

WHO PERPETRATED THE HARASSMENT?

- If the harassment was perpetrated by a non-supervisory employee or a customer or contractor over whom the employer has "control", did the employer have direct knowledge of it or should the employer have known? Were any preventive measures taken? If the harassment was known, was immediate and appropriate corrective action taken? Look for evidence concerning the employer's ability to intervene to prevent or eliminate harassment.
- When the harassment was done by a supervisory employee or agent and the employee is viewed as acting within the scope of employment, the employer is responsible for the harassing conduct even if the employer had no knowledge of the incident(s).

ADDITIONAL RELEVANT QUESTIONS FOR:

TERMINATIONS (OR ANY ADVERSE ACT):

- Did the adverse act actually happen?
- Is the stated reason for the adverse act factually accurate?
- Does the treatment of similarly situated persons indicate that the adverse act was taken because the complainant refused, resisted or objected to sexual advances.
- What happened to others working under the same decision-maker? Determine if they were subjected to the same or similar adverse act. Determine who made the decision and what role the harasser played in it. Determine if decision-maker knew of the complainants' resistance.
- Does the employer's timing of the adverse act indicate that it was taken because the complainant resisted? Is there a change in the way the complainant was treated or evaluated after the resistance? Look for direct or anecdotal evidence to link the adverse act to the complainant's resistance.

CONSTRUCTIVE DISCHARGE:

- Did the employer force the complainant to resign (constructive discharge)? Look for evidence indicating an intolerable work environment. Look to the timeliness and appropriateness of any corrective action and whether working conditions improved as a result, making resignation unnecessary.
- Did the employer have actual or constructive knowledge that resignation was likely to result? Did the complainant inform the employer or agent of pressure to resign? Recall that an employer is expected to be aware of how a reasonable woman (or man) would feel under such circumstances.

ADVERSE ACT AND CONSTRUCTIVE DISCHARGE (In this situation use relevant questions for both adverse act and constructive discharge but note that in this situation the complainant is forced to resign because of the adverse act):

- Did the employer constructively discharge the complainant by the adverse act?

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SELECTION:

- Did the employer fail to hire (select) the complainant because the complainant refused, resisted or objected to the sexual advances?
- Necessary elements for establishing a failure to hire:
  - Was there a vacancy? *and*
  - Did the complainant formally apply or otherwise indicate interest in the vacancy? *and*
  - Did the employer reject the complainant for the position?
- If the employer claims that the complainant is less qualified than the person selected, is this claim accurate? Determine the actual selection criteria used and how the complainant's qualifications compare to those of the person selected. If the complainant is more qualified, an inference can be made that resistance to the advance(s) was the reason for non-selection.
- Is any other rebuttal asserted by the employer valid?
- Is the employer's reason for not selecting the complainant factually accurate?
- How did the employer treat others who were similarly situated?
- Does the employer's application of the pre-selection procedures indicate that the failure to select was because the complainant refused, resisted or objected to sexual advances?
- Does the employer's treatment of others who were harassed or who refused, resisted or objected to sexual advances indicate a pattern of retaliation?
- Does the employer's timing of the failure to select indicate that it was taken because the complainant refused, resisted or objected to sexual advances?
- Does the employer's treatment of the complainant before and after the alleged incident(s) indicate that the failure to select was because the complainant refused, resisted or objected to sexual advances?
- Is there any direct or anecdotal evidence to link the failure to select to the complainant's refusing, resisting or objecting to sexual advances?

WORK-ENVIRONMENT SEXUAL HARASSMENT:

Cases involving harassing work-environment or incidents of sexual harassment without an official employment consequence.

RELEVANT QUESTIONS:

DID HARASSMENT OF A SEXUAL NATURE OCCUR?

- Was the harassment (alleged incident(s)) of a sexual nature?
- Does the evidence indicate that the alleged incident(s) occurred? Look for anecdotal or documentary evidence such as a diary or letter to employer or statement from the complainant, witnesses or employer.
- Is there evidence of a pattern of similar incidences which indicate that the alleged incident(s) occured? Has the charged individual harassed others? Interview others who may have knowledge of past harassment.

DID THE HARASSMENT CREATE AN INTIMIDATING, HOSTILE OR OFFENSIVE WORK ENVIRONMENT?

- Did the harassment interfere with the employee's work performance? Review the extent and nature of the incident(s) and the employee's reaction to the incident(s).
- Was an offensive or hostile work environment created as a result of the acts?

WHO PERPETRATED THE HARASSMENT?

- If the harassment was perpetrated by a non-supervisory employee or a customer or contractor over whom the employer has "control", did the employer have direct knowledge of it or should the employer have known? Were any preventive measures taken? If the harassment was known, was immediate and appropriate corrective action taken? Look for evidence concerning the employer's ability to intervene to prevent or eliminate harassment.
- When the harassment was done by a supervisory employee or agent and the employee is viewed as acting within the scope of employment, the employer is responsible for the harassing conduct even if the employer had no knowledge of the incident(s).

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SECTION E.
REMEDIES

Once the employer is found to have engaged in unlawful sexual harassment, the employer must make the person(s) affected whole for lost earnings and other lost benefits. The employer is not relieved of this responsibility merely by showing that it acted in good faith.

There are a number of remedies available in the resolution of sexual harassment discrimination. It is essential that the investigator be aware of the potential options available to make the victim "whole" should the findings indicate sexual harassment has occurred. Potential remedies should be discussed as recommendations in the report including both what the complainant has requested, as well as any other remedies the investigator believes may additionally be appropriate.

Further, the investigator should consider options available to remedy the employment practices at the worksite for the affected party as well as similarly situated employees. This may include such measures as developing or revising a policy on sexual harassment, training, closer supervision of employees and the establishment of a more effective complaint resolution process.

Finally, the investigator should consider the granting of immediate relief where the possibility of the occurrence of irreparable injury exists and the affected employee is likely to succeed in the pursuit of the claim. Immediate relief might include the issuance of a warning letter from management ordering that the alleged unlawful practices cease at once, granting administrative leave for the complainant during the investigation or transferring the alleged harasser to another work site or unit. Further, if the complainant requests an immediate transfer to another unit or supervisor, the request should be considered. In no circumstances should the complainant be forced to transfer as a result of filing a complaint.

A list of standard remedies for harassment and retaliation from the Federal Equal Employment Opportunities Commission (Section 701-701.4, (EEOC) Compliance Manual) includes the following four as *Minimum Remedies:*

1. Persons who commit acts of intimidation and harassment should be admonished in writing to discontinue such conduct and should be disciplined in proportion to the severity of the case. Make sure due process considerations have been met.
2. The employer should develop and disseminate a clear and direct policy forbidding intimidation and harassment and providing for disciplinary action against violators.
3. The employment records should be cleansed where an adverse personnel action has taken place as a part of the sexual harassment or in retaliation for filing a charge. Other corrective action should be taken as necessary.
4. An immediate offer of rehire with no loss of seniority, wages, or other benefits should be made by the employer where there has been an actual or constructive discharge due to sexual harassment or in retaliation for filing a charge.

Other suggested remedial provisions from the EEOC Compliance Manual include:

Reprisal Protection

Written assurances should be given that the complainant will not be penalized in future considerations for transfers, promotions and other terms and conditions of employment and that no other potential employers will be advised in any way of the facts or circumstances of the complaint. This should include the consequences if retaliation or reprisal still occurs.

Policy

Establishment and dissemination of an EEO Policy and an EEO training program for all supervisors, managers, and employees.

File Purging

The complainant's employment records should be purged of any reference to the discrimination or the facts and circumstances which led to the filing of the complaint.

In addition to the above remedies, the following are appropriate:

Hiring

The employer should hire the individual who was not selected because of sexual harassment.

Seniority

The complainant should be awarded seniority credits that would have been attained in the absence of the discriminatory practice affecting their employment.

Reinstatement/Promotion

An employee who was fired or demoted or denied a promotion because of sexual harassment should be reinstated to the position or promoted and provided with backpay.

Restoration of Sick Leave and Vacation Credits

Sick leave and vacation hours used as a result of the stress experienced by the complainant should be reinstated as credits to the employee's personnel records.

Back Pay

Back pay awards should be provided to reimburse the affected party(s) for the wages lost because of the submission to or rejection of the sexual advance. In order to determine the appropriate amount of back pay, interim earnings or other mitigating factors may be taken into account. Any unemployment insurance

recieved should not be used to reduce the amount of the back pay award.

Back pay awards may reflect overtime pay, shift differentials, holiday or vacation pay, travel pay and expenses, pension, retirement and disability benefits. Often interest on back wages and related items is made a part of the award.

Training

Managers and supervisors should receive training on how to prevent sexual harassment, current policy and law on sexual harassment, and methods of resolving complaints. All employees should receive instruction regarding the employer's policy, the penalties for failing to comply with the policy and information on how to file a complaint. Training may be used by the employer to indicate a good faith effort to prevent future incidents of sexual harassment.

Individuals who lack the necessary training qualifications for desirable jobs because of past sexual harassment consequences may be awarded remedial training to help them qualify.

Front Pay

Front pay is monetary relief for any future loss of earnings resulting from past sexual harassment. Such an award may be appropriate where immediate remedial transfer is not possible, or an appropriate promotion can not be accomplished because an incumbent is holding the position.

Compensatory Damages

Compensatory damages are usually awarded to repay an individual for losses or suffering resulting from or inflicted by the act of sexual harassment. Bases for the claim may include physical illness, psychological and emotional distress, harassment, and vested interests in retirement and pension benefits.

Punitive Damages

The purpose of punitive damages is to penalize a wrongdoer for especially egregious or outrageous actions which are performed with malice (deliberateness or with an intent to commit the action).

Attorney's Fees and Costs

The prevailing party may be awarded reasonable attorney's fees as part of the cost of pursuing relief from sexual harassment. Costs and attorney's fees awards may include, among other things, the costs involved in copying necessary documents, the cost of photographs submitted, and attorney's travel expenses.

It should be noted that this list is by no means complete. Depending upon the circumstances of the case, the investigator may choose to suggest other remedies which may be more appropriate. The investigator should also be aware of what remedies are available in the particular process in which she/he is investigating. In California state civil service, for example, not all of the remedies listed may be awarded by the State Personnel Board. There are limitations that prevent the State Personnel Board from granting certain of the listed remedies.

It is, however, possible for an agreement to be reached between the parties which will allow virtually any remedy to which *all parties agree*. For instance, in the State Personnel Board Discrimination Complaint Process for State employees, an agreement may be reached between the department and the complainant with the approval of the State Personnel Board. If this allows the case to be resolved to each party's satisfaction, it may be the most expedient method for providing remedy and resolution of a sexual harassment case. It also allows more flexibility in "making whole" or providing remedy to the complainant.

The investigator should consider all remedies requested by the complainant even though they may not fit the traditional remedies outlined. Settlement of the complaint may allow for quick resolution and avoid costly litigation. In fact, a settlement agreed upon by all parties is probably the most expeditious solution available in sexual harassment cases.

The investigator's findings will assist management in determining what remedies, if any, to offer in a settlement agreement for a sexual harassment case. Therefore, it is important that the investigator *never* rule out any requested remedy before it has been given careful consideration. Likewise, proposing remedies that the investigator knows are totally unacceptable to the complainant will not result in a resolution of the complaint. If discrimination is found, but the parties cannot agree on appropriate remedy, a resolution may only be available through a determination by the appropriate administrative agency or court.

As a final note regarding remedy, the investigator should be aware that he/she may find a difference in the type of remedy requested by sexual harassment complainants and targets of other types of discrimination. Because sexual harassment is most often perpetrated by an identifiable individual or group of individuals, the complainant is more likely to request punitive or adverse action against the harasser(s). Other types of discrimination are often perpetrated by the organization as an entity, such as in the use of an examination which appears facially neutral, but, in fact, has an adverse impact on minorities. In this instance, back pay or promotion would be a satisfactory remedy. As the investigator, be aware that a request for adverse action as remedy may be the single most important and perhaps the only acceptable remedy. The investigative report should reflect this request and deal with it in the same manner as a request for any other type of remedy.

Chapter 4

BASIC PRINCIPLES OF INVESTIGATION (A REFRESHER)

Investigation is basically a process of problem solving. Most investigations involve five steps: identifying the problem, gathering and recording information regarding the problem, evaluating the information, identifying possible courses of action, and solving the problem. In the case of sexual harassment complaints, the investigator's prime role will focus on gathering and recording information. This involves the greatest amount of time and energy. However, evaluating the information and recommending solutions may be the most difficult tasks for many investigators who often lack information and experience regarding this sensitive subject. Further, management may not support a neutral role for the investigator, who consequently is torn between loyalty to management and the conduct of a fair, thorough and impartial investigation.

This chapter is designed to give the reader a brief overview of major factors to consider in conducting an investigation of sexual harassment allegations. It is intended merely to serve as a refresher. Included is a discussion of direct and circumstantial evidence, where to find evidence, how to evaluate evidence, how to determine the amount of needed evidence, the role of the investigator in the resolution of complaints, and successful interviewing techniques.

Make sure that as the investigator, you are aware of what is expected of you in this process *prior* to initiating the investigation. Clarifying the process and your role will assure that everyone has a clear understanding of that role and will eliminate misunderstandings during the process.

SECTION A. TYPES OF INFORMATION (EVIDENCE)

Basically there are two types of evidence: direct evidence and circumstantial evidence. Direct evidence is any species of proof in the form of testimony from a witness who actually saw, heard, or sensed in some manner (i.e., an "eye witness") the alleged incident. Direct evidence, if believed, tends to prove the existence of a fact at issue without presumption or inference.

For example, suppose that a manager in the Department of Public Affairs is accused of attempting to fondle a secretary in his/her employ. During investigation by the Civil Rights Office of the Department, the investigator discovers two colleagues of the manager who observed the manager attempt to kiss and fondle the secretary. On one occasion, another colleague heard the manager imploring the secretary to go to his apartment with him for lunch. In such a case the testimony by the complainant and the colleagues of the manager would be considered direct evidence tending to prove the fact that the manager did engage in sexual harassment.

Circumstantial evidence is evidence that is not based on actual observation or personal knowledge of the facts at issue, but rather is based on other facts from which deductions are drawn, indirectly showing the facts sought to be proved. Under the above example, suppose that no eyewitnesses could be found. But several persons did see the secretary go into the manager's office when and where she was allegedly fondled, then saw her immediately afterward in an extremely agitated state and heard her relate what had just happened. Further, witnesses saw the manager and the secretary together in the parking lot and after what appeared to be an animated conversation, saw the secretary leave in a hurried and upset manner. Finally, a complaint had been made on a previous occasion against the same manager, and the employer had been able to document that complaint. While none of this evidence directly supports the facts at issue, it does tend to corroborate the secretary's complaint.

It should be emphasized that even though it is necessary to draw inferences from circumstantial evidence it is still valid, useful and legitimate evidence. Circumstantial evidence is often given more weight than direct evidence as in the case where eyewitness testimony differs markedly among eyewitnesses to the same event, even though such evidence is considered direct proof. Circumstantial evidence is merely the taking of facts and evaluating whether such facts support reasonable inferences concerning the event under investigation.

It should also be noted that a central problem relating to the use of direct evidence is the credibility of the testifying witness. On the other hand, problems of relevancy arise with the use of circumstantial evidence. It is important that the investigator recognize the problems associated with each type of evidence in order that unreliable or irrelevant evidence is not given weight in the investigation and that such evidence is described as unreliable or irrelevant and why it is so designated in the investigative report.

SECTION B. SOURCES OF INFORMATION (EVIDENCE)

The primary sources of information in investigations of sexual harassment complaints include:

- Complainant
- Witness(es) and Co-worker(s)
- Alleged Harasser(s)
- Union Representative(s)
- Departmental Records of Personnel Transactions
- Worksite/Work-history Records, such as:
  - Duty Statements
  - Payroll (Time and Travel Records)
  - Collective Bargaining Agreement
  - Organizational Chart and Structure
  - Promotions, Transfers, Hires, Etc.

- Recruitment and Selection Processes
- Former Employees Including Former Supervisors

- Past Practices Data
- Departmental and Organizational Sexual Harassment Policy
- Physical Evidence Such as Letters and Phone Messages
- Police Reports
- Other Related Case Files

The sources of information utilized in an investigation will vary according to the individual complaint. The investigator should plan carefully in order to assure that all sources of evidence have been exhausted and that all legal privacy and confidentiality requirements have been met.

SECTION C. EVALUATING INFORMATION (EVIDENCE)

In many sexual harassment complaint investigations, the information gathered in the course of the investigation may eventually be used in a judicial process, therefore, strict rules of evidence may apply. Often, however, at the agency level the information is merely used to support recommended resolutions. Because of the potential uses of the information, it is critical that prior to conducting an investigation the investigator become aware of the criteria for evaluating evidence in the particular process in which the investigator is involved. Investigators should also be aware of general guidelines in obtaining and evaluating evidence.

The function of the investigator of sexual harassment complaints is to provide enough information for a decision to be made regarding whether or not discrimination based on sexual harassment occurred. All information gathered as evidence should be directed toward answering the following questions:

1. Did personal harm actually occur?
2. If a personnel action has been taken (such as failure to hire, demotion, termination, or change of job assignment), was the employer's reason for the action factually accurate? In the case of work environment harassment, where there has been no personnel action is there any evidence to support a finding that the work environment itself was not sexually harassing in nature?
3. How does the employer treat others similarly situated (with similar experience, training, classifications, etc.)?
4. In the case of an adverse action, were established procedures (such as progressive discipline) consistently applied?
5. Is there any evidence to support a finding of similiar past harassment practices?
6. Are there any anecdotal incidents to indicate a harassment pattern?

Evidence is something which ultimately demonstrates a fact. For the discrimination complaint investigator, the evidence should specifically provide facts to answer the above questions.

In evaluating evidence which will be both admissible in litigation and will clearly illuminate the complaint at hand, there are several basic rules:

1. Only *relevant* evidence is admissible.

   Evidence is relevant if it may lead to the production of evidence which tends to prove or disprove facts of consequence to the case.

   If a piece of evidence has no relevant bearing on the questions at issue, it is not admissible. The investigator should take careful note of the relevance of each piece of evidence in order to assure that it has a logical bearing on the question.

2. Statements of persons must be based on their own knowledge.

   A witness is only allowed to testify to a fact from her/his own knowledge. Expressing an opinion or speculating is not admissible. The only exception to this rule is expert testimony in which a witness is asked to express an opinion based on her/his expertise.

   It is preferable to have the witness' statement signed and sworn to in the form of an affidavit.

3. Documents must appear authentic (i.e., one which has not been altered, one which is "official", one which is not reconstructed).

   Although the original of a document is not usually necessary, the copy submitted should appear authentic and reliable. The investigator should never make marks on the document or alter it in any way.

4. Be careful with hearsay.

   Although hearsay is normally admissible in an administrative process, it is preferable to have the witness make his/her statement in person rather than have someone else tesify as to what he/she said because generally hearsay is not admissable in a judicial forum. Hearsay evidence is usually less strong than non-hearsay and, therefore, the investigator should pursue other types of evidence that would prove the fact at issue. The investigator should take statements or interview all individuals involved rather than rely on hearsay.

5. Witnesses' statements should be evaluated with regard to:

   a. The qualifications of the witness to testify.

      In order to determine if a witness is qualified, the

investigator should discover the background facts which enable the witness to provide information concerning the matters in question. For example, Al worked two desks down from the complainant for the last 10 months. Al states that he was able to observe the supervisor tell dirty jokes to the complainant on three separate occasions. Al has personal knowledge of relevant information.

b. The witness' vested interest in the outcome of the complaint.

Often a witness who is of a different sex or at a higher classification than the complainant is considered to be more disinterested in the outcome of the controversy, especially if he/she is giving testimony which is adverse to her/his own interests. Because of this, if the investigator knows of any particular reason why the witness might be interested in the outcome of the case this interest should be noted.

6. Witnesses' statements should be detailed and contain facts instead of conclusions.

It is up to the investigator to develop conclusions based on the facts. The witnesses' statements should be used to provide detailed accounts of the specific instances of harassment and issues directly related to the controversy. For example, it is of greater value to establish how "P's" performance compares with similarly situated employees than to have a witness state that "P" is a "good worker" and thus should have received a promotion.

7. If possible, witnesses' statements should be supported by other evidence.

If a witness gives important information, the investigator should make every reasonable effort to verify or support this information through other sources of evidence.

SECTION D. DETERMINING THE AMOUNT OF INFORMATION (EVIDENCE) NECESSARY

As noted above, the investigator's role is to gather enough evidence to make a reasonably reliable judgment on the question of whether or not sexual harassment occurred. In practice, it is impossible to assemble all evidence that is technically relevant. The investigator should be aware of time and resource constraints in order to focus on obtaining that information which is most likely to lead to a reliable conclusion within those constraints. Several general considerations should be kept in mind.

- Determine key relevant questions and investigate them first. It may not be necessary to go on to the remaining relevant questions if the overall outcome of the key questions is clear.
- Do not over-investigate a question for which a clear answer has been obtained. The answer to a relevant question may be clear immediately after the basic evidence is checked. If so, resist the temptation to continue gathering information on that question and go on to another.
- Do a complete fact finding of any unclear relevant questions. If the initial information leaves the answer to a question unclear and it appears additional information may significantly clarify the issue, then additional inquiries should be made and further evidence checked.
- Always check evidence supporting both sides. The investigator is responsible for checking relevant evidence no matter which side it favors. It is important to avoid the common trap of focusing on evidence which supports only one side of the disputed question.
- Obtain the information yourself. The investigator should not rely solely on information provided by either the complainant or management, but should determine what is necessary evidence and obtain it. Likewise, do not decide a disputed issue on the basis that one party does not provide evidence relevant to the question. The investigator has an obligation to gather the evidence personally and should never make a decision against one party over the other based on a failure to provide evidence. Complainants should provide certain kinds of basic information to which they have ready access, such as the names of possible witnesses, etc. Beyond this basic information, however, the complainant is not responsible for developing evidence and conducting the investigation.
- Obtain the most reliable evidence that is reasonably available. If the only evidence that is readily available in a particular investigation is a type that is considered the least reliable, an investigator must search further for evidence to support the conclusion.

SECTION E. THE BASICS OF INTERVIEWING

Successful interviewing depends on adherence to some basic rules:

1. Plan the interview. Select the proper time and place, develop a list of questions, decide how to record the interview (notes, tape recorder, etc.), and be mentally prepared.
2. Conduct the interview with some degree of privacy, off-site if possible. Make sure that the conversation cannot be overheard or interrupted. Distractions must be kept to a minimum.
3. Have all available facts at hand during the interivew.

This will save time and assure that no important facts or questions are overlooked.

4. Keep the object of the interview in mind and know what information you need to obtain from each individual.
5. Conduct the interviews as soon as possible.
6. Encourage the witness to do most of the talking. Ask the witness to relay the story in his/her own words.
7. Be a good listener. Allow the witness to tell her/his own story before questioning. Use the questioning period to clarify information.
8. Be courteous and friendly to the witness, but be professional. Conduct the interview in an efficient manner.

The object of the interview is to obtain reliable, usable information to complete the investigation of a complaint and make a determination. The following techniques will assure that the investigator elicits as much information as possible.

Always:

- Ask questions which are open-ended and will elicit a narrative from the witness. For example, ask a question such as "What did you do next?" and allow the witness to give you an answer in his/her own words.
- Clarify any part of the statement that you do not understand. Although a witness should never be interrupted, the investigator should note any confusing parts of the statement and make sure they are clarified prior to the conclusion of the interview.
- Be sure you listen to everthing the witness says. Do not allow yourself to be distracted by thinking about the next question, but concentrate on the witness' story which may reveal important new information or a needed verification.
- Allow the witness to direct her/his own testimony. By using non-directive questions, the investigator can be sure that the witness is not being led to a conclusion. Repeating the last part of the witness' sentence as a question will require a response without the individual being led.
- Understand that not all individuals will be truthful. Some witnesses may, for a variety of reasons, purposefully lie, withhold information or provide misleading information. The investigator should always watch for signs of deception either by noting "facts" which do not make sense or by observing the body language and demeanor of the witness. The investigator may choose to challenge a witness by raising conflicting "facts" or may merely report the conflicts as part of the summary of facts.
- Obtain a statement from the witness at the conclusion of the interview. Review the story of the witness and ask her/him to sign a statement relating it in his/her own words.

An investigator should never:

- Give a witness information which has been obtained from other sources. If the witness asks questions, do not provide answers which express a view of any information which is at issue.
- Give information to a witness which allows the witness to guess what answer the investigator is expecting. The witness should not be able to anticipate what he or she *thinks* the investigator wants to hear.
- Ask questions that can be answered "yes" or "no", because you will not obtain sufficient information.
- Argue with the witness. The interview is designed to provide the investigator with the witness' story. Arguing points with the witness will not help meet this goal.
- Promise the witness that he/she will not have to testify. The witness may be called upon to testify in a punitive action hearing, in a court setting such as a tort action or even a criminal proceeding.
- Give the witness the impression that you either believe or do not believe her/his story. Do not reveal any biases about the facts or the merit of the complaint.

Reviewing this refresher before beginning a sexual harassment complaint investigation will aid in planning and conducting a thorough and reliable investigation. There is no substitute for the proper training of investigators. Every investigator should be provided the best training available on the techniques of discrimination complaint investigation. It is essential that investigators remain current on the legal standards for discrimination law and sexual harassment discrimination law, in particular.

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APPENDICES

A.

74676 Federal Register V. 45, No. 219
Monday, November 10, 1980
Rules and Regulations

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1604

Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Amendment to Guidelines on Discrimination Because of Sex.

EFFECTIVE DATE: November 10, 1980.

FOR FURTHER INFORMATION CONTACT: Karen Danart, Acting Director, Office of Policy Implementation, Equal Employment Opportunity Commission, 2401 E Street, NW., Washington, D.C. 20506, (202) 634-7060.

SUPPLEMENTARY INFORMATION: During the 60-day public comment period which ended on June 10, 1980, the Commission received over 160 letters regarding the Guidelines on sexual harassment. These comments came from all sectors of the public, including employers, private individuals, women's groups, and local state, and federal government agencies.

The greatest number of comments, including many from employers, were those commending the Commission for publishing guidelines on the issue of sexual harassment, as well as for the content of the guidelines.

The second highest number of comments specifically referred to § 1604.11(c) which defines employer liability with respect to acts of supervisors and agents. Many commentors, especially employers, expressed the view that the liability of employers under this section is too broad and unsupported by case law. However, the strict liability imposed in § 1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees. Similarly, the commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor. *Anderson v. Methodist Evangelical Hospital, Inc.*,—F.Supp.—, 3 EPD ¶8282 (D.C. Ky. 1971), *aff'd* 464 F.2d 723, 4 EPD ¶7901 (6th Cir. 1972); Commission Decision No. 71-969, CCH EEOC Decisions (1973) ¶6193; Commission Decision No. 71-1442, CCH EEOC Decisions (1973) ¶6216. Furthermore, a recent 9th Circuit case on sexual harassment impose strict liability on the employer where a supervisor harassed an employee without the knowledge of the employer. *Miller* v. *Bank of America*, 600 F.2d 211, 20 EPD ¶30,086 (9th Cir. 1979). In keeping with this standard, the Commission, after full consideration of the comments and the accompanying concerns, let § 1604.11(c) stand as it is now worded.

A number of people asked the Commission to clarify the use of the term "agent" in § 1604.11(c). "Agent" is used in the same way here as it is used in § 701(b) of Title VII where "agent" is included in the definition of "employer".

A large number of comments referred to § 1604.11(a) in which the Commission defines sexual harassment. These comments generally suggested that the section is too vague and needs more clarification. More specifically, the comments referred to subsection (3) of § 1604.11(a) as presenting the most troublesome definition of what constitutes sexual harassment. The Commission has considered these commments and has decided that subsection (3) is a necessary part of the definition of sexual harassment. The courts have found sexual harassment both in cases where there is concrete economic detriment to the plaintiff, *Heelan* v. *Johns-Manville Corp.*, 451 F.Supp. 1382, 16 EPD ¶8330 (D. Colo. 1978), *Barnes* v. *Costle*, 561 F.2d 983, 14 EPD ¶7755 (D.C. Cir. 1977), *Garber v. Saxon Business Products*, 552 F.2d 1032, 14 EPD ¶7587 (4th Cir. 1977), and where unlawful conduct results in creating an unproductive or an offensive working atmosphere. *Kyriazi* v. *Western Electric Co.*, 461 F.Supp. 894, 18 EPD ¶8700 (D.N.J. 1278). For analogous cases with respect to racial harassment see *Rogers* v. *EEOC*, 454 F.2d 234, 4 EPD ¶7597 (5th Cir. 1971); *EEOC* v. *Murphy Motor Freight Lines, Inc.*, 488 F.Supp. 381, 22 EPD ¶30,888 (D.C. Mn. 1980).

The word "substantially" in § 1604.11(a)(3) has been changed to "unreasonably". Many commentors raised questions as to the meaning of the word "substantially". The word "unreasonably" more accurately states the intent of the Commission and was therefore substituted to clarify that intent.

It should be emphasized that the appropriate course for further clarification and guidance on the meaning of § 604.11(a)(3) is through future Commission decisions which will deal with specific fact situations. Since sexual harassment allegations are reviewed on a case-by-case basis, any further questions will be answered through Commission decisions which will be fact specific.

A fair number of comments were received on § 1604.11(d) which defined employer liability with respect to acts of persons other than supervisors or agents. Again, as in § 1604.11(c), the traditional Title VII concept prevails regarding employer liability with respect to those people other than agents and supervisory employees. Many commentors asked the Commission to clarify the meaning of "others". As a result, § 1604.11(d) has been separated into two subsections. The new § 1604.11(d) refers to sexual harassment among fellow employees and the liability of an employer in such a situation.

The new § 1604.11(e) refers to the possible liability of employers for acts of non-employees towards employees. Such liability will be determined on a case-by-case basis, taking all facts into consideration, including whether the employer knew or should have known of the conduct, the extent of the employer's control and other legal responsibility with respect to such individuals.

A number of people also raised the question of what an "appropriate action" might be under § 1604.11(d). What is considered to be "appropriate" will be seen in the context of specific cases through Commission decisions.

Section 1604.11(e) of the Interim Guidelines, which sets out suggestions for programs to be developed by employers to prevent sexual harassment, now becomes § 1604.11(f). The Commission has received many comments which state that this section is not specific enough. The Commission has decided that the provisions of this section should illustrate several kinds of action which might be appropriate, depending on the employer's circumstances. The emphasis is on preventing sexual harassment, and § 1604.11(f) intends only to offer illustrative suggestions with respect to possible components of a prevention program. Since each workplace requires its own individualized program to prevent sexual harassment, the specific steps to be included in the program should be developed by each employer.

Several commentors raised the question of whether a third party who was denied an employment benefit would have a charge cognizable

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SUMMARY: On April 11, 1980, the Equal Employment Opportunity Commission published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex, 29 CFR Part 1604.11, 45 FR 25024. This amendment will re-affirm that sexual harassment is an unlawful employment practice. The EEOC received public comments for 60 days subsequent to the date of publication of the Interim Guidelines. As a result of the comments and the analysis of them, these Final Guidelines were drafted.

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under Title VII where the benefit was received by a person who was granting sexual favors to their mutual supervisor. Even though the Commission does not consider this to be an issue of sexual harassment in the strict sense, the Commission does recognize it as a related issue which would be governed by general Title VII principles. Subsection (g) has been added to recognize this as a Title VII issue.

After carefully considering the numerous comments it recieved, the EEOC made the above changes to the Interim Guidelines and, at its meeting of Septemeber 23, 1980, adopted them as the Final Guidelines on sexual harassment, subject to formal interagency coordination. Formal interagency coordination has been completed, and none of the affected agencies had additional comments. Therefore, these Guidelines become final as adopted at the Commission meeting of September 23, 1980.

Signed at Washington, D.C., this 3rd day of November 1980.
Eleanor Holmes Norton,
Chair, Equal Employment Opportunity Commission

Accordingly, 29 CFR Chapter XIV, Part 1604 is amended by adding § 1604.11 to read as follows:

PART 1604— GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

§ 1604.11 Sexual Harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance of creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervsiory or agency capacity.

(d) With respect to conduct between fellow employees, and employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsbility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment form occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.))
(FR DOC. 80-34981 Filed 11-7-80; 8:45 am)
BILLING CODE 6570-06-M

[1] The principles involved here continue to apply to race, color, religion or national origin.

B.

§ 12940 California Government Code

§12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California:

. . . (i) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or superisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment. The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities. However, "employer" does not include a religious association or corporation not organized for private profit. For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926. Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(j) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(Amended by Stats. 1981, c. 11, p. 24, § 1; Stats. 1981, c. 270, p. 1363, § 1; Stats. 1982, c. 1184, p.___, § 1; Stats. 1982, c. 1198, p.___, § 2; Stats. 1984, c. 1754, p.___, § 2.)

FAIR EMPLOYMENT AND HOUSING COMMISSION REGULATIONS CALIFORNIA ADMINISTRATIVE CODE

§ 37287.6. Terms, Conditions and Privileges of Employment.
(a) Fringe Benefits. (Reserved.)
(b) Harassment.

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(1) Harassment includes but is not limited to:

(A) Verbal harassment, *e.g.*, epithets, derogatory comments or slurs on a basis enumerated in the Act;

(B) Physical harassment, *e.g.*, assault, impeding or blocking movement, or any physical interference with normal work or movement when directed at an individual on a basis enumerated in the Act;

(C) Visual forms of harassment, *e.g.*, derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

(D) Sexual favors, *e.g.*, unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors. [See also Section 7291.1(f)(l).]

(E) In applying this subsection, the rights of free speech and association shall be accommodated consistently with the intent of this subsection.

(2) Harassment of an applicant or employee by an employer or other covered entity, its agents or supervisors is unlawful.

(3) Harassment of an applicant or employee by an employee other than those listed in subsection (b)(2) above is unlawful if the employer or other covered entity, its agents or supervisors knows of such conduct and fails to take immediate and appropriate corrective action. Proof of such knowledge may be direct or circumstantial. If the employer or other covered entity, its agents or supervisors did not know but should have known of the harassment, knowledge shall be imputed unless the employer or other covered entity can establish that it took reasonable steps to prevent harassment from occurring. Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned.

(4) An employee who has been harassed on the job by a co-employee should inform the employer or other covered entity of the aggrievement; however, an employee's failure to give such notice is not an affirmative defense.

(f) Interpersonal Conduct and Appearance.

(1) Sexual Harassment. Sexual harassment is unlawful as defined in Section 7287.6(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances.

C.

State Personnel Board

Sexual Harassment Policy

The State Personnel Board has just issued a policy memorandum to Department Directors and Agency Secretaries regarding the subject of sexual harassment. That memorandum, in the form of a "pinkie," required departments to establish a policy prohibiting sexual harassment, convey information to all employees regarding the problems of sexual harassment and, finally, to send a copy of the policy to the State Personnel Board Women's Program Manager by June 15, 1981.

In order to assist you in educating and sensitizing employees, we are distributing some additional information on sexual harassment, including more detailed examples; a description of employee rights; consequences of sexual harassment for both employee and employer; complaint filing options; and some specific guidelines for developing a comprehensive sexual harassment policy.

It should be made clear to all that sexual harassment is prohibited by both State and Federal laws, and guidelines of the Equal Employment Opportunity Commission.

DEFINITION

Sexual harassment is defined as unsolicited and unwelcome sexual advances, requests for sexual favors, and other verbal, physical or visual conduct of a sexual nature which occurs under any one of three circumstances:

1. Submission is made either explicitly or implicitly a term or condition of employment.
2. Submission or rejection by an employee is used as a basis for employment decisions affecting the employee.
3. Such conduct has the potential to affect an employee's work performance negatively and/or create an intimidating, hostile or otherwise offensive working environment.

For the purpose of further clarification, sexual harassment includes, but is not limited to:

1. Making unsolicitied written, verbal, physical and/or visual contact with sexual overtones. (Written examples: suggestive or obscene letters, notes, invitations. Verbal examples: derogatory comments, slurs, jokes, epithets. Physical examples: assault, touching, impeding or blocking movement. Visual examples: leering, gestures, display of sexually suggestive objects or pictures, cartoons, or posters.)
2. Continuing to express sexual interest after being informed that the interest is unwelcome. (Reciprocal attraction is not considered sexual harassment.)
3. Making reprisals, threats of reprisal, or implied threats of reprisal following a negative response. For example, either implying or actually withholding support for an appointment, promotion, or change of assignment; suggesting a poor performance report will be prepared, or suggesting probation will be failed.
4. Engaging in implicit or explicit coercive sexual behavior which is use to control, influence, or affect the career, salary, and/or work environment of another employee.
5. Offering favors or employment benefits, such as promotions, favorable performance evaluations, favorable assigned duties or shifts, recommendations, reclassifications, etc., in exchange for sexual favors.

CONSEQUENCES OF THE PROBLEM

Sexual harassment is a form of discrimination. It is employee misconduct that can decrease work productivity, undermine the intergrity of employment relationships, decrease morale and cause severe emotional stress and physical damage. Such behavior can have economic consequences to both employer and employee as well. Employees who have refused advances in some instances have been dismissed, denied pay raises, and/or denied promotional opportunities. This is clearly unfair and inappropriate.

Department Directors and managers and supervisors also face serious economic implications because of their inherent responsibility for the actions of their employees. Incidents of sexual harassment can lead to:

- High turnover rate, and increased time and money spent on training.
- Ineffective use of time during work hours.
- Costly salaries paid for nonproductive work hours.
- Employee absence due to court hearings and meetings related to discrimination complaints.
- Costs of reinstatement, back pay, and punitive damage awards.
- Withdrawal of Federal support funds.
- Disciplinary sanctions.
- Workers' compensation claims.
- Breach of contract awards.
- Embarassment and adverse publicity.

DEPARTMENTAL RESPONSIBILITY

Departments are responsible for creating a workplace environment free of sexual harassment. They share with the State Personnnel Board responsibility for providing counseling, assistance and support for victims of sexual harassment.

Prevention is the best tool against sexual harassment. Prompt, appropriate department action may help avoid, or at least minimize, the incidence of sexual harassment and employer liablitity. A policy statment prohibiting sexual harassment and training to sensitize employees, supervisors and managers to behavior that constitutes sexual harass-

ment is essential. All departmental supervisory training and employee orientation programs should contain a comprehensive section on sexual harassment and employee's rights and options. Departmental affirmative action plans should highlight the department's commitment to prevent and prohibit sexual harassment.

EMPLOYEE RESPONSIBILITY

An employee should understand the importance of informing an individual that his/her behavior is unwelcome, offensive, in poor taste or highly inappropriate. If an employee (victim) feels threatened or has difficulty expressing disapproval, informal assistance and counseling should be sought from such persons as the departmental Women's Program Officer, Affirmative Action Officer, or the Equal Employment Opportunity Counselor. Employees may also wish to seek advice and counseling outside his/her department.

EMPLOYEES' RIGHTS

All departments are required to develop a discrimination complaint process. Protection under this process assures employees of:

1. The right to a discrimination-free work environment.
2. The right to an informal, confidential presentation of a complaint to a competent counselor.
3. The right to keep their complaint confidential until such time as they give the counselor permission to do otherwise, in order to bring the complaint to the appropriate authority for remedy; or until such time as a formal complaint is filed.
4. The right to a full, impartial and prompt investigation by a trained departmental investigator.
5. The right to review all relevant information developed and discovered during the course of any investigation and inquiry into the matter.
6. The right to a timely decision from the appointing power, or authority designated by the appointing power, after full consideration of all relevant facts and circumstances.
7. The right to be represented by a person of the complainant's choosing at each and all steps of the process.
8. The right to appeal the appointing power's decision within 30 days to the State Personnel Board or appropriate Federal agencies.
9. The right to be free from reprisals after filing a complaint.

HOW COMPLAINTS WILL BE HANDLED

Each department has the responsibility of providing counseling, support, and referral services to sexual harassment victims. Under State Personnel Board rules, each department is required to establish a process for dealing with complaints of discrimination. State employees who believe that they are or have been victims of sexual harassment should seek informal remedy through the departmental discrimination complaint process. Although cases will be dealt with on an individual basis, it is important that incidents of sexual harassment be reported as soon as possible.

POSSIBLE CONSEQUENCES FOR THE HARASSER

Employees should be made aware that acts of sexual harassment can lead to disciplinary action, including letters of reprimand, suspension, demotions, as well as the possibility of civil liability for both the violator and the Department.

STATE PERSONNEL BOARD INVOLVEMENT

An employee may appeal a departmental decision to the State Personnel Board within 30 days from the date of the decision. If you need assistance in this regard, you should contact the Appeals Division at (916) 322-2777 or ATSS 492-2777.

When sexual harassment is found to have occurred, the State Personnel Board can order employment-related remedies such as reinstatement, appointment (promotion or lateral transfer), back pay or other corrective actions. A victim may, with the consent of the Board, file charges against another State employee requesting that punitive action be taken for disciplinary purposes (Government Code Section 19583.5).

Personnel Board staff are available to assist departments in the development of a policy, to review departmental complaint processes for effectiveness and to assist in the training of employees. The Women's Program Unit in PEAAD is also available to assist departments and individuals in the support and counseling of victims of sexual harassment.

It is anticipated that an Intergovernmental Personnel Act (IPA) grant will enable the Board to assign an individual to deal specifically and exculsively with the problem of sexual harassment.

OTHER COMPLAINT FILING OPTIONS

Employees may file discrimination charges with the EEOC (Federal level) within 300 days of the incident, regardless of the status of a departmental complaint. For further information, contact the Equal Employment Opportunity Commission at 1390 Market Street, Suite 325, San Francisco, CA 94102 (415) 556-0261.

In addition, while we have discussed formal processes for resolving sexual harassment discrimination complaints, informal processes are also available and should be conveyed to employees. Contacts can be made with concerned and knowledgeable sources such as advocacy and special interest groups, employee organizations, local women's organizations and community counseling centers.

CIVIL PROCEEDINGS

Various tort lawsuits (e.g., breach of contract, assault and battery, intentional and negligent infliction of emotional distress, etc.) are also possible if the pursuit of a remedy through administrative procedures does not result in a satisfactory solution. The usual statute of limitations for filing is one year and it can take from three to seven years to receive disposition. It should be noted, however, that if this process is used, a claim must first be presented to the Board of Control within 100 days of the discrimination event (Government Code Sections 900–910).

FOR MORE INFORMATION

Employees wishing to make further inquiries regarding the sexual harassment policy may contact the State Personnel Board's Public Employment and Affirmative Action Division, specifically the Women's Program Unit, at (916) 323-0723, or ATSS 473-0723. Information regarding the discrimination complaint process can also be obtained from the Appeals Division at (916) 322-2777 or ATSS 492-2777.

MARCH 19, 1981

Attachment 1 to SPB Policy
Guidelines for Development of a Departmental Policy for Sexual Harassment

We recognize that policies will vary to meet the needs of each department, but a comprehensive policy will typically include the following components:

1. *Director's Statement of Commitment*

To raise the consciousness and awareness of all employees, Directors must lead the way. The policy should state the prohibition of sexual harassment and express commitment to enforcing disciplinary actions against such behavior.

2. *Definition of Sexual Harassment*

This portion of the policy should give a clear definition of the type of behavior that constitutes sexual harassment and cite specific examples of visual, written, verbal and physical forms of sexual harassment.

3. *Departmental Responsibility and Employee Rights and Responsibilities*

This information should cover employees' training and identify departmental counselsors. It should stress the fact that employees have certain rights that are protected by law. (The right to a discrimination-free work environment, the right to file confidential complaints, the right to be represented, etc.) Employees should be advised of their individual responsibility to inform the harasser that his/her behavior is unwelcome, offensive, or highly inappropriate. Individuals should also be encouraged to file timely complaints.

4. *Potential Consequences of Sexual Harassment*

This information should emphasize the emotional and financial effects that sexual harassment can have on employees and employers. It should point out examples of some of the costly economic consequences and demonstrate potential ways that departmental productivity will decrease as a result of such behavior.

5. *Potential consequences for the "harasser"*

This section to highlight the types of disciplinary actions, such as letters of reprimand, suspension, demotion, as well as possible civil liabilities for both the harasser and the department.

6. *Discrimination Complaint Process*

This information should describe the discrimination complaint process, identify departmental and Personnel Board staff responsible for providing counseling and technical assistance. It should also encourage informal contact with advocacy and special interest groups, employee organizations, local women's organizations and community counseling centers. This information should also indicate the types of actions that may result from incidents of sexual harassment. (For example: removal of sexually suggestive objects, pictures, cartoons and posters, letters of reprimand, suspensions and removal from positions.)

7. *Additional Options*

Employees should be advised of the right to appeal a departmental decision to the State Personnel Board. Information on EEOC and other formal and informal options should also be provided.

D.

§ 19572, 19682, 19702 California Government Code
State Civil Service Provisions

§19752. Each of the following constitutes cause for discipline of an employee, or person whose name appears on any employment list:

(a) Fraud in securing appointment.
(b) Incompetency.
(c) Inefficiency.
(d) Inexcusable neglect of duty.
(e) Insubordination
(f) Dishonesty.
(g) Drunkenness on duty.
(h) Intemperance.
(i) Inexcusable absence without leave.
(k) Conviction of a felony or conviction of a misdemeanor involving moral turpitude. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, to a charge of a felony or any offense involving moral turpitude is deemed to be a conviction within the meaning of this section.
(l) Immorality.
(m) Discourteous treatment of the public or other employees.
(n) Improper political activity.
(o) Willful disobedience.
(p) Misuse of state property.
(q) Violation of this part or board rule.
(r) Violation of the prohibitions set forth in accordance with Section 19990.
(s) Refusal to take and subscribe any oath or affirmation which is required by law in connection with the employment.
(t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.
(u) Any negligence, recklessness, or intentional act which results in the death of a patient of a state hospital serving the mentally disabled or the developmentally disabled.
(v) The use during duty hours, for training or target practice, of any material which is not authorized therefor by the appointing power.
(w) Unlawful discrimination, including harassment, on the basis of race, religious creed, color, national origin, ancestry, physical handicap, marital status, sex, or age, against the public or other employees while acting in the capacity of a state employee.
(x) Unlawful retaliation against any other state officer or employee or member of the public who in good faith reports, discloses, divulges, or otherwise brings to the attention of, the Attorney General, or any other appropriate authority, any facts or information relative to actual or suspected violation of any law of this state or the United States occurring on the job or directly related thereto.

(Added by Stats. 1945, c. 123, p. 567, § 1. amended by Stats. 1949, c. 1416, p. 2468, § 3; Stats. 1951, c. 862, p. 2374, § 12; Stats. 1961, c. 293, p. 1325, § 3; Stats. 1963, c. 1620, p. 3213, § 2; Stats 1978, c. 69, p. 188, § 1; Stats. 1980, c. 718, § 1; Amended by Stats. 1981, c. 230, p. 1167, § 54; Amended by Stats. 1984, c. 1754, p. ——, § 4.)

§19682. Every person who violates any provision of this chapter is guilty of a misdemeanor. Adverse action may be taken by the appointing power, or the executive officer of the board may file charges, against a state employee who violates any provisions of this chapter.
(Added by Stats. 1945, c. 123, p. 571 § 1. Amended by Stats. 1957, c. 1697, p. 3073, § 1; Amended by Stats. 1984, c. 1754, p. ——, § 5.)

§ 19702. (a) A person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, marital status, or physical handicap unless it can be shown that the particular handicap is job related. For purposes of this article, "discrimination" includes harassment. This subdivision is declaratory of existing law.

(b) As used in this section, "physical handicap" includes, but is not limited to, impairment of sight, hearing, or speech, or impairment of sight, of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.

(c) As used in this section, "physical handicap" shall not include obesity or any other health impairment caused by such person's obesity.

(d) If the board finds that a person has engaged in discrimination under this part, and it appears that this practice consisted of acts described in Section 243.4, 261, 286, 288, 288a, or 289 of the Penal Code, the board, with the consent of the complainant, shall provide the local district attorney's office with a copy of its decision and order.

(e) If the board finds that discrimination has occurred in violation of this part, the board shall issue and cause to be served on the appointing authority an order requiring the appointing authority to cause the discrimination to cease and desist and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and compensatory damages, which, in the judgment of the board, will effectuate the purposes of this part. Consistent with this authority, the board may establish rules governing the award of compensatory damages. The order shall include a requirement of reporting the manner of compliance.
(Added by Stats. 1945, c. 123, p. 571, § 1. Amended by Stats. 1963, c. 1253, p. 2776, § 1; Stats. 1976, c. 1436, p. 6409, § 10; Stats. 1977, c. 573, p. 1817, § 1; Amended by Stats. 1984, c. 1754, p. ——, § 6.)

E.

California Education Code

§ 200. State policy; purpose

It is the policy of the State of California to afford all persons, regardless of their sex, equal rights and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts which are contrary to that policy and to provide remedies therefor.
(Added by Stats. 1982, c. 1117, p. ——, §1.)

§ 210. Educational institution

For purposes of this chapter, "educational institution" means a public or private preschool, elementary, or secondary school or institution; a public or private institution of vocational, professional or postsecondary education; the governing board of a school district; the governing board of a community college district; the Regents of the University of California; the Trustees of the California State University, or any combination of school districts or counties recognized as the administrative agency for public elementary or secondary schools.
(Added by Stats. 1982, c. 1117, p. ——, § 1)

§ 212.5. Sexual harassment

For purposes of this chapter, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

(a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.

(b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.

(c) The conduct has the purpose or effect of having negative impact upon the individual's work or academic performance or of creating an intimidating, hostile, or offensive work or educational environment.

(d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.
(Added by Stats. 1984, c. 1371, p. ——, § 1)

§ 213. State financial assistance

For purposes of this chapter, "state financial assistance" means any funds or other form of financial aid appropriated or authorized pursuant to state law, or pursuant to federal law administered by any state agency, for the purpose of providing assistance to any educational institution for its own benefit or for the benefit of any students admitted to the educational institution.

State financial assistance shall include, but not be limited to, all of the following:

(a) Grants of state property, or any interest therein.

(b) Provision of the services of state personnel.

(c) Funds provided by contract, tax rebate, appropriation, allocation, or formula.
(Added by Stats. 1982, c.1117, p. ——, § 1.)

§ 214. State student financial aid

For purposes of this chapter, "state student financial aid" means any funds or other form of financial aid appropriated or authorized pursuant to state law, or pursuant to federal law administered by any state agency, for the purpose of providing assistance directly to any student admitted to an educational institution. State student financial aid shall include, but not be limited to, scholarships, loans, grants, or wages.
(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 220. Extent of prohibition

No person shall be subjected to discrimination on the basis of sex in any program or activity conducted by an educational institution which receives or benefits from state financial assistance or enrolls students who receive state student financial aid.
(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 230. Particular practices prohibited

For purposes of this chapter, harassment and other discrimination on the basis of sex include, but are no limited to, the following practices:

(a) On the basis of sex, exclusion of a person or persons from participation in, denial of the benefits of, or subjection to harassment or other discrimination in, any academic, extracurricular, research, occupational training, or other program or activity.

(b) On the basis of sex, provision of different amounts or types of student financial aid, limitation of eligibility for student financial aid, or the application of different criteria to applicants for student financial aid or for participation in the provision of student financial aid by others. Nothing in this subdivision shall be construed to prohibit an educational institution from administering, or assisting in the administration of, scholarships, fellowships, or other forms of student financial aid, established pursuant to domestic or foreign wills, bequests, trusts, or similar legal instruments or by acts of a foreign government, which require that awards be made to members of a particular sex; provided,

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that the overall effect of the award of these sex-restricted scholarships, fellowships, and other forms of student financial aid does not discriminate on the basis of sex.

(c) On the basis of sex, exculsion from participation in, or denial of equivalent opportunity in, athletic programs. For purposes of this subdivision, "equivalent" means equal or equal in effect.

(d) On the basis of sex, harassment or other discrimination among persons, including, but not limited to, students and nonstudents, or academic and nonacademic personnel, in employment and the conditions thereof, except as it relates to a bona fide occupational qualification.

(e) On the basis of sex, the application of any rule concerning the actual or potential parental, family, or a marital status of a person, or the exclusion of any person from any program or activity or employment because of pregnancy or related conditions.

(Added by Stats. 1982, c. 1117, p. ——, § 1.; amended by Stats. 1984, c. 1371, p. ——, § 1.)

§ 232. Rules, regulations, or orders

The State Board of Education, the Board of Governors of the California Community Colleges, and the Trustees of the California State University shall issue rules, regulations, or orders to implement the provisions of this chapter.

The Regents of the University of California may issue rules, regulations, or orders to implement the provisions of this chapter.

(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 250. Assurance of compliance; prerequisite to state financial assistance or student financial aid

Prior to receipt of any state financial assistance or state student financial aid, and educational institution shall provide assurance to the agency administering the funds, in the manner required by the funding agency, that each program or activity conducted by the educational institution will be conducted in compliance with the provisions of this chapter and all other applicable provisions of state law prohibiting discrimination on the basis of sex. A single assurance, not more than one page in length and signed by an appropriate responsible official of the educational institution, may be provided for all the programs and activities conducted by an educational institution.

(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 251. Reports

A school district or a community college district shall submit timely, complete, and accurate compliance reports to the State Department of Education or to the chancellor's office, as those entities may require.

All reports submitted pursuant to this section shall be made available by the educational institution for public inspection during regular business hours.

(Added by Stats. 1982, c. 1117, p. , § 1.)

§ 260. Responsibility for ensuring that district programs and activities are free from discrimination; monitoring compliance with rules and regulations

The governing board of school district shall have the responsibility for ensuring that district programs and activities are free from discrimination based on ethinic group identification, religion, age, sex, color, or physical or mental disability, and for monitoring compliance with any and all rules and regulations promulgated pursuant to Section 11138 of the Government Code.

(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 261. Implementation pursuant to existing regulations and procedures

The provisions of this chapter shall be implemented pursuant to existing regulations and procedures promulgated pursuant to Section 11138 of the Government Code, governing the filing and handling of written complaints of prohibited discrimination.

(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 262. Primary responsibility for ensuring that district programs and activities are free from discrimination; review of complaints and reports; monitoring compliance

(a) The governing board of a community college district shall have the primary responsibility for ensuring that district programs and activities are free from discrimination based on ethnic group identification, religion, age, sex, color, or physical or mental disability.

(b) The Chancellor's office of the California Community Colleges shall have responsibility for all of the following:

(1) Reviewing original complaints of alleged unlawful discrimination filed pursuant to Section 59328 of Title 5 of the California Administrative Code.

(2) Reviewing reports of the nature and extent of the investigation of each complaint conducted by the district.

(3) Reviewing reports of any actions taken by the district to resolve each complaint.

(4) Monitoring the compliance of each district with any and all regulations promulgated pursuant to Section 11138 of the Government Code.

(Added by Stats. 1982, c. 1117, p. ——, § 1.)

§ 264. Applicability to University of California

No provision of this chapter shall be applicable to the University of California unless the Regents of the University of California, by resolution, make the provisions applicable.

(Added by Stats. 1982, c. 1117, p. ——, § 1.)

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